UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, DC

NORTHTOWN MECHANICAL, INC.

Respondent

and Case 14–CA–106453

BRANDON MURRAY,

an Individual

Michael Werner, Esq.,
for the General Counsel.
Joseph Hurtado, pro se,
for the Respondent.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Overland Park, Kansas, on January 16 and 27, 2014. Brandon Murray (Murray)[1] filed the charge on June 4, 2013,[2] and filed an amended charge on July 23, 2013. The General Counsel issued the complaint on July 30, 2013. The Respondent filed a timely Answer on August 21, 2013, denying all material allegations in the complaint.[3] (GC Exhs. 1-A to P.)

The complaint alleges that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (NLRA/the Act) when (1) on or about December 14, the

[1] Brandon Murray is also known as Luke Murray.
[2] All dates are in 2012, unless otherwise indicated.
[3] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R Exh." for Respondent's exhibit; "ALJ Exh." for administrative law judge exhibit; "Jt. Exh." for joint exhibit; "GC Br." for General Counsel's brief; and "R Br." for Respondent's brief.

Respondent reduced the wages of Murray;[4] and (2) on or about December 29, the Respondent discharged Murray.[5] In its posthearing brief, the General Counsel moved to amend the complaint by withdrawing complaint paragraph 5(c) which alleged that on December 21, 2013, the Respondent demoted Murray. (GC Br. 2; GC Exh. 1-I.) In accordance with Sections 102.17 and 102.45 of the Board's Rules and Regulations, the General Counsel's motion is granted.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, installs plumbing for commercial and industrial construction projects. It manages projects out of its office and place of business in Smithville, Missouri. The Respondent admits, and I find that it purchased and received at its Smithville, Missouri facility goods valued in excess of $50,000 from other enterprises, including Ferguson Enterprises, located within the State of Missouri, each of which other enterprises had received these goods directly from points outside the State of Missouri.

The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find that Plumbers and Gasfitters Local Union No. 8 (Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation

The Respondent is a plumbing contractor for commercial and industrial construction projects. Its work force varies in size depending on the needs of the particular project. The Respondent has employed union and nonunion workers.

The Respondent admits, and I find that Joseph Hurtado (Hurtado) is its president and a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

B. Respondent Becomes Contractor on McCrite Project and Signs Union Contract

In August or September 2012, the Respondent was hired by Neighbors Construction (Neighbors) as the plumbing contractor on a project to build the McCrite Plaza Senior Living

[4] This allegation is alleged in par. 5(a) of the complaint.
[5] This allegation is alleged in par. 5(c) of the complaint.

Center at Briarcliff (McCrite). The project was expected to last until November 2013. (Tr. 12–13.) Since at least 2001, Aaron Neighbors (Aaron) has been vice president and project manager for Neighbors.[6] (Tr. 70.) Since 1985, James McConnaughy (McConnaughy) has been an employee and superintendent for Neighbors. (Tr. 88.) Initially, the Respondent subcontracted out the plumbing work on the McCrite project to Horizon Mechanical.[7] Due to mistakes it made in installing plumbing, in about October 2012, Horizon Mechanical was removed from the project and the Respondent assumed the role of installing the plumbing. The Respondent was responsible for correcting the mistakes made by Horizon Mechanical, completing the remaining underground rough end work, work on the top rough, and finish all 167 units.[8] (Tr. 13–14.)

On or about September 27, 2012, the Respondent hired Murray as a foreman at a rate of $25 an hour. (Tr. 14, 32.) He reported directly to Hurtado. (Tr. 33.) At the time he was hired, Murray was not a union member. He was expelled from the Union in January 2012 for non-payment of union dues. (Tr. 31–32.) Initially, Murray was the sole plumber assigned to the McCrite project by the Respondent. (Tr. 36–37.)

Due to the demands of the McCrite project and Hurtado's decision that Murray needed help supervising the project, on October 26, the Respondent signed a contract with the Union to acquire additional plumbers to work on the project. (Tr. 15, 51–52.) The contract allowed the Union to send the Respondent both nonprobationary and probationary union status employees.[9] The Respondent was not required to remit benefits to the Union on behalf of the probationary employees. (Tr. 16.) The Respondent's work on the McCrite project stopped while it worked out the details of the contract with the Union. (Tr. 59.) After entering into the contract with the Respondent, the Union referred, and the Respondent, over a period of time, hired the following plumbers: John Robinson (Robinson), Michael Smith (Smith), Steve Bathune (Bathune), and James Singleton (Singleton). CJ (last name unknown) was hired as a laborer. (Tr. 36–37.) During the relevant period, other plumbers (names unknown) were also hired by the Respondent. (Tr. 36.)

There is undisputed testimony that on an unknown date in 2012, Union Organizer Jim Stout told Hurtado that Murray's union membership had been terminated for failure to pay dues. Stout informed Hurtado that as his current employer, the Respondent might have to pay back benefits for Murray. (Tr. 17–18.) Hurtado responded to him that the Respondent was not responsible for Murray's back benefit payments. (Tr. 18, 25.) Hurtado also noted that he told Stout he was not going to fire Murray because of "issues" the Union had with Murray.[10] (Tr. 26.)

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[6] Aaron is also the son of the owner of Neighbors. (Tr. 28.)

[7] Murray worked as an employee of Horizon Mechanical for approximately 2 days before being hired by the Respondent. (Tr. 52–53.)

[8] Hurtado explained that "rough in" refers to plumbing that is installed behind sheetrock in the walls. (Tr. 14.)

[9] Probationary employees are not union members until they have completed their 6 months probationary period. If they successfully complete their probation, the Respondent has the option to agree to convert them to nonprobationary union status with full union benefits. (Tr. 15–16.)

[10] Hurtado denied that his remarks to the Union that he was not going to fire Murray was in response to a Union demand to discharge him. (Tr. 26.) He denied that Stout or any other union official told him he could not employ Murray unless his union membership was reestablished. (Tr. 18.) I do not credit

Based on the Respondent's refusal to pay for Murray's arrears, Stout informed Hurtado that he would have to discuss the situation with the Union's business manager, Chuck Tarpley (Tarpley). The evidence established that the dispute between the Respondent and the Union regarding payment of back benefits for Murray was ongoing.[11] (Tr. 16–17; GC Exhs. 4, 5)

C. December 14, Respondent Reduces Murray's Wages

As previously noted on September 27, the Respondent hired Murray as the foreman and paid him $25 an hour. In his role as foreman Murray supervised crew members, reviewed the project's blueprints, coordinated work with other trades assigned to the project, met with the general contractor, and processed new hires' paperwork. (Tr. 38, 43.) When Hurtado notified Murray that he was signing a contract with the Union for additional plumbers, Murray asked him how it would affect his position. Hurtado informed him that he would become the foreman-in-training because Murray could not be a foreman over union members and he also felt Murray needed help controlling and delegating manpower. (Tr. 34–35, 51–52.) Hurtado did not explain why Murray could not supervise union members. In late November or early December, Smith became the foreman.[12] (Tr. 16, 37, 134.) Subsequently, on or about December 7, the Respondent reduced Murray's wages to $20 an hour. (Tr. 19, 34; GC Exh. 3.)

Initially, Murray worked well with the newly hired plumbers and Smith. (Tr. 37.) However, in early December Stout came to the jobsite and spoke privately with Smith and Bathune. (Tr.38.) After Stout's visit, Murray noticed that the attitudes of the plumbers towards him changed "dramatically" and his working relationship with Smith began to deteriorate. (Tr. 38.) Subsequently, Murray was no longer allowed to review the project's blueprints. Also, he was prohibited from giving instructions to workers in the other trades and had to coordinate work through Smith and Bathune. (Tr. 38–39.) On the day after he saw Stout talking with Smith and Bathune, he telephoned Hurtado to talk about Smith's and Bathune's change in attitude. Hurtado told him not to worry because he "wasn't going to fire me regardless of what they [the union and Stout or Smith and Bathune] said." (Tr. 39.) Since the situation with his coworkers did not improve, Murray made another call to Hurtado to complain. During this conversation, Hurtado reassured him he would not be fired and told Murray "multiple times" that he informed the Union that if he were to fire him, Murray could sue him and the Union. (Tr. 40.) The evidence

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Hurtado's testimony.

[11] Although Hurtado testified that he only had one discussion with the Union about its demands that the Respondent pay Murray's back benefits, there is more credible evidence to support my finding that it was an ongoing dispute. In his last conversation with Murray, Hurtado admitted to him that he was "fighting" with the Union because of its demands that he pay for the past due benefit payments. (GC Exhs. 4, 5.)

[12] Smith testified that he could not recall the exact date of his hire but thought he started working for the Respondent in October 2012. However, I find that the evidence shows he was mistaken and it is more likely that he started in late November or early December 2012. The evidence established that he was not hired until after the union contract was signed on October 26. It has also been established that the Union did not refer any plumbers for at least a month after the contract was signed in order to allow time to work out the details of its terms. Consequently, the timeline shows that Smith could not have been hired by the Respondent until late November or early December.

established that the Respondent informed the Union on several occasions that it would not terminate Murray.[13] (Tr. 16–17; GC Exhs. 4, 5.)

On or about December 14, the Respondent reduced Murray's wages from $20 to $18 an hour. (Tr. 19–20, 40–41; GC Exh. 3.) When he became aware of the wage reduction, Murray called Hurtado, who told him that he lowered his pay in response to complaints from Smith and the other plumbers.[14] (Tr. 19, 42.) Regardless of the reasons Hurtado gave for reducing Murray's pay, from approximately December 17 to 24, he appointed Murray the acting foreman when Smith quit. (Tr. 43.) While serving as the acting foreman, Murray learned from a friend that the Respondent was going to fire him. He asked Hurtado if the rumors about his impending termination were true and Hurtado denied it. (Tr. 43–44.) Approximately a week later, Bathune was appointed the permanent foreman. (Tr. 43–44.)

D. Events Leading to Murray's Discharge on December 29

Approximately 30 minutes into the workday on December 28, Murray asked a coworker, Singleton, a work related question. As Singleton responded, Bathune told Murray to stop talking to "my guys." (Tr. 44–45.) Murray explained to him why he was talking to Singleton and then continued gathering materials he needed for work. Bathune followed Murray into the work trailer and told him to "go home for the day." When Murray asked for a reason, Bathune accused him of having "an attitude" and lack of production. In response to Murray's continued questioning, Bathune used a profanity and told him to leave. (Tr. 45–46.) Murray left and immediately called Hurtado to report what happened. (Tr. 46.) On December 29, Murray reported to work but Bathune told him he could not return to work until Murray spoke with Hurtado. Murray attempted to contact Hurtado but got his voicemail so he went home. (Tr. 46–47.) December 29, was Murray's last day working for the Respondent. (Tr. 47.) He did not speak with Hurtado until January 2, when they arranged to meet at an agreed on location. (Tr. 46–47.)

On January 3, 2013, Murray met with Hurtado to get his final paycheck. (Tr. 47.) Murray surreptitiously tape recorded their conversation. (GC Exhs. 4, 5.) During the meeting Hurtado stated Murray had trouble on the job partly because Murray had angered a lot of union officials and members in the union. Hurtado told him that Smith spoke negatively about Murray at the union hall and to the Union's Executive Board. Hurtado explained he could not return him to the McCrite project because of the tension between Murray and the union members, but would try to put him on a different project. (GC Exhs. 4, 5.) Hurtatdo told Murray he would probably hire him toward the end of the following week on another project because, "I've got no complaints about you Luke as far as anything like that." (GC Exhs. 4, 5.) Hurtado also

[13] Although Hurtado testified that the Union never demanded that the Respondent discharge Murray, I do not credit his testimony. (Tr. 18.) There is more credible evidence to support my finding that it was an ongoing dispute. (GC Exhs. 4, 5.)

[14] Murray testified that Hurtado told him that he decided to lower his wage rate because the probationary plumbers and the Union were complaining that his pay was higher than the probationary employees' wages. (Tr. 42.) Hurtado testified that he told Murray he lowered his pay because his investigation supported the probationary plumbers' complaints that Murray was producing less work than they were producing. (Tr. 19, 22.)

acknowledged that Murray completed a lot of plumbing work. During their conversation, Hurtado repeatedly stated he told the Union he would not fire Murray. He also told Murray that he refused the Union's demands to pay his back benefits because at the time he hired Murray he was not a union member. (GC Exhs. 4, 5.) At the conclusion of the conversation, which lasted less than 10 minutes, Murray collected his paycheck and left. (GC Exh. 4.) There is no evidence that Hurtado ever hired him to work on any other projects for the Respondent.

By letter dated April 1, 2013, Neighbors notified the Respondent that its subcontract on the McCrite project was terminated with immediate effect. (GC Exh. 6.) Neighbors terminated the Respondent's contract because it was dissatisfied with its delay in completing the job, failure in correcting mistakes, and damages caused by the Respondent on the project. (Tr. 77–78, 81–83; GC Exh. 6.)

III. DISCUSSION AND ANALYSIS

A. Legal Standards

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009).

Section 8(a)(3) of the Act precludes an employer from discriminating against an employee in the "hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. §158. In essence, Section 8 gives employees the right to join a union or abstain from union membership without fear of reprisal from an employer. *Machinists Local Lodge 414 (Neufeld Porsche-Audi)*, 270 NLRB 1330, 1333 (1984). Thus, it is a violation of Section 8(a)(3) for an employer to terminate an employee because of the employee's nonunion status. *L.D. Kichler Co*., 335 NLRB 1427, 1430–1431 (2001).[15] Based on the totality of the circumstances, a finding may be made that a union caused an employer to discharge an employee even if there is no evidence of an express demand that the employer take the action. *Bricklayers Local No. 1 (Mason Contractors Assn.)*, 308 NLRB 350 (1992). Moreover, an employer can be found to have violated Section 8(a)(3) without a finding that a union violated Section 8(b)(2). *Brunswick Corp. (Carpenters Local 107)*, 131 NLRB 1338, 1344 (1961).

The *Wright Line*[16] analysis is appropriate in cases that involve an employer's motivation for taking an adverse employment action against an employee. *Hoodview Vending Co.,* 359

[15] If there is a lawful union-security agreement, an employer may discharge an employee as a result of a union demand provided certain conditions have been met. *Communications Workers v. Beck*, 487 U.S. 735 (1988); *Monson Trucking*, 324 NLRB 933 (1997); *Green Team of San Jose*, 320 NLRB 999 (1996). However, this case does not involve a union-security agreement.

[16] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

NLRB No. 36 (2012); *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063, 1065 (2009); and *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003). Under *Wright Line*, the burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in concerted activities; (2) the concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel can rebut the employer's proof by offering evidence that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,* supra, slip op at 5. Ultimately, the General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)).

B. Complaint Allegations

1. Respondent reduces Murray's wages

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when on or about December 14, the Respondent reduced Murray's wages to gain the favor of the Union. (GC Br. 10.) The Respondent denies the allegation arguing that Murray's wages were reduced because he was routinely late to work, came to work unprepared to instruct the crew, left the jobsite with the entire job crew without permission, and had poor productivity. (R. Br. 1–2.)

Murray's decision to abstain from joining the union is protected concerted activity. It is also clear that the Respondent was aware of Murray's protected concerted activity. (Tr. 14–17.) Last, I find that the General Counsel has proven that the Respondent's decision to reduce Murray's wages was motivated by his protected concerted activity.

Hurtado testified that on December 14, he reduced Murray's wages because several (unnamed) plumbers complained that Murray was paid at a higher rate but producing less work than them. After confirming with Smith, who felt the complaints were merited, Hurtado reduced Murray's pay to $18 an hour. (Tr. 19–20, 22, 103, 136–137.) However, I do not find Hurtado credible on this point. During his conversation with Murray on January 3, 2013, Hurtado admitted that he did not have any concerns with his productivity. In response to Murray's boast about the quality and quantity of his work, Hurtado agreed, ". . . I'll give you credit for that, because that I saw. How much you got done." (GC Exhs. 4, 5.) Further, Hurtado admitted that

he did not provide Murray written disciplinary warnings, nor document the reasons for his decision to reduce Murray's wages. (Tr. 20.)

Although, Hurtado stated that he repeatedly counseled Murray about his poor work performance, there is no objective or credible corroborating evidence to support him on this point. I did not find the corroborating witness' (Smith) testimony helpful or completely credible for several reasons. Smith gave the appearance of ambivalence about Murray's job performance. His testimony about Murray's work as a plumber ranged from below average to average to knowledgeable about the project. (Tr. 134–135, 139.) Further, Smith only worked with Murray a few weeks. More importantly, there was undisputed testimony that Smith did not like Murray and maligned him to union members, including Union Officials Stout and Tarpley. (GC Exhs. 4, 5.) I find it is more probable than not that his hostility towards Murray negatively colored his testimony about Murray's worth as an employee. Regardless, Smith's opinion of Murray's job performance could not have made the negative impression on Hurtado as he (Hurtado) contends because after Smith allegedly voiced his opinion to him that Murray's productivity was poor, Hurtado appointed him acting foreman when Smith left. (Tr. 42–43.) This action, and the other evidence set forth in this decision, undermines Hurtado's contention that he made the decision to reduce Murray's wage rate because he needed help managing his crew while he was the foreman.

Last, I find there is credible evidence that the Union repeatedly pressured the Respondent to remit benefits to the Union on behalf of Murray or terminate him. The first such occurrence happened shortly after the Respondent entered into a contract with the Union for workers. Stout informed Hurtado that the Union might make the Respondent responsible for Murray's back benefits. (Tr. 16–17.) Again in early and mid-December, Hurtado told Murray not to be concerned about his job security because despite the Union's continued demands, he would not fire Murray. (Tr. 26, 38–39.) Late in December Murray and Hurtado had a similar discussion. (Tr. 44.) Further, Hurtado's January 3, 2013, conversation with Murray confirms that the Union's demand that the Respondent remit benefit payment on behalf of Murray was an ongoing dispute. Hurtado told Murray, "Right now, I'm doing something—I'm fighting with the union on you because they want me to go ahead and pay your back benefits. . . . Well I'll give it to the lawyer and I'll call you back and I'll talk to you about it again." (GC Exhs. 4, 5.) This conversation establishes that as late as January 2013, the Union continued to pressure the Respondent about Murray's nonunion status.

Accordingly, I find that the General Counsel established by a preponderance of the evidence that Murray's nonunion status was a substantial or motivating factor in the Respondent's decision to reduce his pay rate. Further, I find that the Respondent's articulated reasons of its actions are merely pretext for discrimination. Based on the evidence, I find that the Respondent violated Section 8(a)(1) and (3) when on or about December 14, 2012, it reduced Murray's wages.

2. Respondent discharges Murray

The General Counsel alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when on or about December 29, the Respondent discharged Murray because of union complaints and pressure. (GC Br. 13.) The Respondent denies the allegation arguing that

Murray was terminated because he was routinely late to work or absent; he came to work unprepared to instruct the crew; he and his job crew took extended breaks without permission; and he had poor productivity. (R. Br. 1–2.)

As noted earlier in the decision, Murray surreptitiously recorded his last meeting with Hurtado. During this conversation, Hurtado made statements that, in combination, clearly prove Murray was discharged because of union pressure due to his nonunion status. Hurtado explained that Murray had angered a lot of people in the Union, including union officials. He told Murray, "You know, because I can't put you back out there with them [union] guys." (GC Exhs. 4, 5.) Hurtado continued, "I think I've got another project that's going to start toward the end of next week and I think I'm going to probably put you on that project over there, so you can have something to do. Because I've got no complaints about you Luke as far as anything like that. I think that this thing with the union—I don't know what that's going to turn into. . . ." (GC Exhs. 4, 5.) Reading the entire transcript of the recorded conversation in context, it is clear that Hurtado instructed Murray to call him later in the week after he had time to resolve Murray's union status with the Union's business manager, Tarpley. (GC Exhs. 4, 5.) In light of theses admissions, I do not believe Murray was terminated for the reasons advanced by the Respondent at the hearing and in its posthearing brief.

Even assuming that one does not read Hurtado's statements as a clear admission that Murray's discharge was illegal, I nevertheless find that his asserted reasons are pretext for discrimination. Hutado testified that Murray was discharged because the vice president and project manager (Aaron) for Neighbors complained specifically about the poor quality of Murray's work. (Tr. 23.) According to Hurtado, during an onsite inspection of the McCrite project, Aaron reviewed an apartment unit where Murray had installed the plumbing and asked, "Who did this unit? . . . it looks like someone wasn't qualified to put it in." (Tr. 21.) However, Aaron credibly denied singling out Murray's work for criticism. He recalled pointing to a number of problems with the plumbing installation during the walk-through with Hurtado and felt overall the work the Respondent had completed "was pretty bad off everywhere." (Tr. 73.) Further, Aaron did not inspect the Respondent's work until February or March 2013, at least a month or more *after* the Respondent had already discharged Murray.[17] (Tr. 79–80.) Aaron credibly testified that he never discussed a particular employee with Hurtado, nor recommended an employment action be taken against any of the Respondent's employees. (Tr. 82.) Ultimately, Neighbors terminated its contract with the Respondent because its subcontractor (Horizon) caused an expensive workplace accident; the Respondent was never on schedule with its completion dates; and the Respondent used defective glue to install the piping, which caused Neighbors to remove all the plumbing that the Respondent had installed. (Tr. 74, 82–85.) In its letter to the Respondent, nowhere does Neighbors mention Murray as a reason for terminating its contract with the Respondent. (GC Exh. 6.)

[17] Hurtado testified that Aaron conducted at least one of his on-site inspections in early December. I credit Aaron's recollection of the on-site inspection dates. His role as a neutral third-party witness and overall demeanor makes him a more credible witness than Hurtado. Even assuming I credit Hurtado's recollection of the correct date of the inspection, the question becomes why would he appoint Murray interim foreman after Neighbor's complained about Murray's work quality and then wait about a month before terminating him? The Respondent failed to set forth a credible response.

During the hearing the Respondent advanced, for the first time, additional reasons for discharging Murray. However, I find that these reasons are likewise pretext for discrimination. Hurtado now claims that Murray's low productivity was a factor in his termination. However, the evidence proves otherwise. As noted earlier, on January 3, 2013, Hurtado acknowledged in a conversation with Murray that he did not have any complaints or concerns about his work performance. (GC Exhs. 4, 5.) It is also noteworthy that the Respondent did not call as witnesses any of the unnamed plumbers to support the assertion that they complained about Murray's productivity. Although Smith testified that Murray's work was "sloppy" and other plumbers complained about his low productivity, he admitted that Hurtado insisted on keeping Murray on the job because of his knowledge of the McCrite project. (Tr. 139.)

Hurtado contends that Murray was also terminated because he allowed the job crews to take extended breaks from work. The only evidence to support Hurtado's belatedly articulated reason that the extended breaks played a role in Murray's discharge is testimony from McConnaughy. However, his testimony on this point is sketchy at best. In response to the Respondent's leading question, McConnaughy testified that he did not remember telling Hurtado on several occasions that none of the employees were working. However, he noted that it was possible he may have called Hurtado on several occasions to inquire about the whereabouts of the work crews. (Tr. 88–89.) I find that neither statement sufficiently corroborates Hurtado's testimony on this point. Therefore, the Respondent is left with nothing more than a self-serving statement that is not supported by any corroborating or objective evidence.

The Respondent also called Smith to testify that Murray was frequently absent from work. (Tr. 134–135, 137.) However, I do not find Smith's testimony persuasive. If Murray's alleged absenteeism was a major reason for his discharge, then why would the Respondent insist in its sworn affidavit that Neighbor's complaint about Murray's work performance was the sole reason for his termination? (Tr. 101–102.) Hurtado's admission in his hearing testimony that Murray was discharged for several reasons contradicts the sworn affidavit he provided to the NLRB that the complaint from Neighbors' was the sole reason for Murray's discharge. (Tr. 102.) He failed to provide any convincing reason for the discrepancy between his affidavit and trial testimony. I find the evidence establishes that these newly articulated reasons for discharging Murray are poorly disguised attempts to hide the fact that the Respondent took discriminatory action against him because of the Union's complaints and pressure.

Based on the evidence, I find that the General Counsel made an initial showing that Murray's nonunion status was a motivating or substantial reason for the Respondent's decision to discharge Murray. I also find that the Respondent's articulated reasons for discharging Murray are false or pretextual. Accordingly, I find that the Respondent has violated Section 8(a)(1) and (3) of the Act as alleged in the complaint.

CONCLUSIONS OF LAW

1. The Respondent, Northtown Mechanical, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Plumbers and Gasfitters Local Union No. 8 is a labor organization within the meaning of Section 2(5) of the Act.

3. By reducing the wages of its employee, Brandon Murray, because he engaged in protected concerted activity, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By discharging its employee, Brandon Murray, because he engaged in protected concerted activity, the Respondent has violated Section 8(a)(1) and (3) of the Act.

5. By reducing the wages and subsequently discharging its employee, Brandon Murray, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

6. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily reduced the wage rate of its employee, Brandon Murray, must make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him from the date of the discrimination to the date of his wage rate is adjusted accordingly.

The Respondent having discriminatorily discharged its employee, Brandon Murray, must offer him reinstatement and make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him from the date of the discrimination to the date of his reinstatement.

Backpay because of the discriminatory wage reduction and discharge shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010) enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate Brandon Murray for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.,* 359 NLRB No. 44 (2012).

Further, Respondent will be required to post and communicate by electronic post to employees the attached Appendix and notice that assures its employees that it will respect their rights under the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Northtown Mechanical, Inc., Smithville, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Reducing the wages of its employees or otherwise discriminating against any employee for exercising their right to join a union or abstain from union membership.

(b) Discharging or otherwise discriminating against any employee for exercising their right to join a union or abstain from union membership.

(c) In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Brandon Murray full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of the Board's Order, return Brandon Murray to the wage rate he was earning prior to the discriminatory reduction of his wages, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Within 14 days from the date of the Board's Order, make Brandon Murray whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Brandon Murray, and within 3 days thereafter notify

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Brandon Armstrong in writing that this has been completed and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Smithville, Missouri, copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 14 Subregion 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 14, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 10, 2014

Christine E. Dibble (CED)
Administrative Law Judge

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT reduce your wages or otherwise discriminate against any employee for exercising their right to join a union or abstain from union membership or engage in other concerted activities protected by Section 7 of the National Labor Relations Act (the Act).

WE WILL NOT discharge you because you or discriminate against any employee for exercising your right to join a union or abstain from union membership or engage in other concerted activities protected by Section 7 of the National Labor Relations Act (the Act).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Brandon Murray full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, return Brandon Murray to the wage rate he was earning prior to the discriminatory reduction of his wages, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, make Brandon Murray whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Brandon Murray, and within 3 days thereafter notify Brandon Armstrong in writing that this has been completed and that the discharge will not be used against him in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Brandon Murray for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

NORTHTOWN MECHANICAL, INC.
(Employer)

DATED:_____ BY_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Suite 8.302
St. Louis, Missouri 63103-2829
Telephone: (314) 539-7770
Fax: (314) 539-7794
Hours of Operation: 8:30 a.m. to 5:00 p.m. CST

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7770.